No. 19321

United States Court of Appeals

For the Ninth Circuit

NED EDWARD HETT, *Appellant*,

vs.

UNITED STATES OF AMERICA, *Appellee*.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE WILLIAM T. BEEKS, *Judge*

PETITION FOR REHEARING

MURRAY B. GUTERSON,
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Seattle, Washington 98104

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TABLE OF CASES

CONSTITUTION

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Appeal from the United States District Court for the Western District of Washington, Northern Division

Honorable William T. Beeks, *Judge*

PETITION FOR REHEARING

Appellant respectfully requests a rehearing. This petition is filed not as a matter of form or routine, but because our painstaking review of the opinion compels us to the conclusion that our principal constitutional point was somehow not fully communicated to and appreciated by the court. Before turning to this, however, we do wish to very briefly touch on three other points as follows.

We continue to feel that 18 U.S.C. 1073 is subject to only one reasonable construction, namely that the illegal flight must be alleged to have originated in the place seeking to prosecute the one in flight. Likewise, we continue to feel that no substantial evidence was presented making a rational connection between the movements of Young from March 8 through March 28, 1963 with a Kirkland, Washington grocery store robbery of December 1, 1962. And, also, we still believe that whatever evidence there was on the question of Young's motive for his travels should have been measured by the test of *the* dominant motive and not *a* dominant motive.

Notwithstanding our continuing belief in the propriety of these three points we are, we think, wise enough to realize that the court has understood what we argued and chosen

to reject our contentions. Quite frankly, if this was all we read in the opinion of November 18, 1965, then this petition would not be presented, and we would instead be already preparing our petition for certiorari.

But this is not all; to the contrary, we are tremendously troubled by the Fifth Amendment point we presented and the court's reaction to it; both by what the court wrote about this point and what the court did not write. If we understand the court's opinion, at page 5 thereof, the court is saying (1) that the claim of privilege against self-incrimination as made by Young and Tichenor during cross-examination was valid; (2) that the previous testimony of each did not cause either to waive the right to assert the privilege; and (3) it was not error to refuse to strike any or all of the direct testimony of either when the assertion of the privilege was upheld during cross-examination. What the court does *not* say is whether it found the cross-examination to be either germane or collateral to the issues in Hett's case and if, as we feel everyone agrees, germane, then why it upheld the refusal to strike. This was the crux of both our written and oral argument on this point, and we are gravely distressed that somehow we were totally misunderstood.

Before turning to this question, however, we do wish to make the following observation. We agree that the claim of privilege was valid either for reasons advanced by the Government at trial and most certainly under *Murphy v. Waterfront Commission*, 378 U.S. 52, as cited by the court, *if there was no waiver. Murphy v. Waterfront* has no bearing on the waiver question. But here there was a waiver, and any objective reading of the record so shows.

We earnestly beseech the court to read pages 644-655 of the transcript where Young on direct examination tells of a trip on March 4, 1963 to Seattle and some details of his stay and departure on March 8, 1963, and then read pages 702-707

where, on cross-examination, he is permitted to refuse to tell the other and really crucial details thereof insofar as Hett's case is concerned. Then also contrast the without reservation redirect examination on pages 751-754 with the assertion of privilege which was upheld on recross-examination at pages 765, 766, 772, and 774.

For the court to say the waiver question was "a close one," but to discard it on the theory that the questions concerned Count I only is totally inaccurate. What the trial was all about was to ascertain whether a dominant connection existed between a Kirkland, Washington robbery of December 1, 1962 and travels of Young from March 8 to March 29, 1963. To say questions concerning March 4 or March 5 relate only to the March 8 trip and not to the March 22 trip charged in Count III is unreal and inaccurate, particularly when we bear in mind that the court's opinion indicates no problem in connecting the trip of March 22, 1963 all the way back to December 1, 1962. There was, in fact, a clear waiver here as to questions which affected all counts, not simply Count I.

The rule in this court clearly supports a finding of waiver. See *Semler v. United States*, 332 F.2d 6, 7 (9th Cir. 1964) where the rule was stated that waiver turns on whether or not the cross-examination is on a subject gone into on direct examination. All we ask is that the court apply its own rule to this question.

Now, we return to what we believe to be the most crucial point, i.e., a valid fear of some or many prosecutions gives rise to a valid claim of privilege which for the sake of argument we will now say had not been waived. So what do we do when Young asserts the privilege. The answer turns on *U.S. v. Cardillo*, 316 F.2d 606 (2nd Cir. 1963). We respectfully refer the court's attention to page 611 of that opinion which we set out in detail at page 36 of our opening brief.

Simply, the rule is that we must determine whether the

privilege was upheld as to questions which were germane or, on the other hand, merely collateral to the issues in the case on trial. Nowhere in the court's opinion, here, is there even any intimation that this singularly crucial point was considered.

Of course, *Cardillo, supra,* holds that if the privilege is sustained to questions germane to the matter on trial then you must strike the direct testimony; if as to questions merely collateral to the issues in the trial, then nothing need be done. The vitality of this rule is amply demonstrated at page 613 of *Cardillo, supra,* where reversal is ordered because of failure to strike direct testimony when the cross-examination to which the privilege was asserted and upheld was very nearly only an attack on credibility of the witness. The point is that this is a most zealous right and, here, in Hett's case, the court's opinion shows it was not even considered. Since *Cardillo,* the following cases have been decided, all of which reiterate that the *Cardillo* approach to the problem is the only proper one and must be the approach taken: *Smith v. U.S.,* 331 F.2d 265 (8th Cir. 1964); *U.S. v. Smith,* 342 F.2d 525 (4th Cir. 1965); and *Coil v. U.S.,* 343 F.2d 573 (8th Cir. 1965).

Each of these cases illustrate this approach of the court concerning itself first with the direct examination, then the cross-examination, and then ascertaining (in the aforementioned cases) the cross-examination to be merely collateral as directed solely toward the witness's credibility. Our case, of course, is just the opposite, because none of the questions were in the nature of attacks on Young's credibility. Instead, every question was directed to the "why" of Young's movements on the very dates involved in Hett's trial. What could be more germane?

Not only does the court omit any discussion of this point but so does the Government's brief. No suggestion is made

anywhere that the privilege was claimed on collateral matters only. And, certainly, the court's opinion itself most clearly demonstrates that the trip of March 22, 1963 relates to the robbery of December 1, 1962, and thus any probing of activities from March 4 to 8, 1963 is clearly germane to Count III, as well, of course, as being germane in the sense of not simply attacking Young's character.

So again what we urge is that the Ninth Circuit adopt the same rule as the Second, Fourth, and Eighth Circuits, apply this rule, and then state what has to follow from such application. So far the court here has been silent about this basic matter, and this, primarily, is why in this case, unlike so many others, a rehearing is absolutely necessary.

For the reasons as set out above, appellant respectfully petitions this Court to rehear this matter.

Respectfully submitted,

MURRAY B. GUTERSON,
Attorney for Appellant.

CERTIFICATE OF COUNSEL

I certify that in my judgment this petition for rehearing is well founded and further that it is not interposed for purpose of delay.

MURRAY B. GUTERSON, *Attorney.*